STATE OF MICHIGAN
IN THE SUPREME COURT

MARY ANN HEGADORN,
Plaintiff-Appellant,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.
_____/

Supreme Court No. 156132
Court of Appeals No. 329508
Livingston Circuit Court
No. 2014-028394-AA

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

ESTATE OF DOROTHY LOLLAR,
by DEBORAH D. TRIM, Personal Representative,
Plaintiff-Appellant,
v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.
_____/

Supreme Court No. 156133
Court of Appeals No. 329511
Livingston Circuit Court
No. 2014-028395-AA

ROSELYN FORD,
Plaintiff-Appellant,
v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.
_____/

Supreme Court No. 156134
Court of Appeals No. 331242
Washtenaw Circuit Court
No. 2015-000488-AA

APPELLEE MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BRIEF IN RESPONSE TO THE BRIEF IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL BY ELDER LAW AND DISABILITY RIGHTS SECTION OF THE STATE BAR OF MICHIGAN AND MICHIGAN CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS

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TABLE OF CONTENTS

Page

Index of Authorities ii

Introduction 1

Argument 2

I. The Michigan Court of Appeals correctly held that the assets in the Trusts held by these Community Spouses were countable assets for the Medicaid eligibility of their Institutionalized Spouses. 2

A. The general rules for the calculation of trust assets for anyone whose assets must be counted for a Medicaid eligibility determination are found in 42 USC 1396p(d) and make the trust assets of these community spouses countable assets for eligibility of their institutionalized spouses. 2

1. Medicaid 2

a. Divestment Analysis 3

b. Countable Asset Analysis 4

c. Congress provided the rules to assess the trusts of anyone whose assets must be counted for Medicaid and has exempted only Special Needs trusts from general trust rules. 4

II. Under all applicable law and policy, the Department correctly determined that the assets held in the trusts of community spouses, Ralph Hegadorn, Dallas Lollar, and Herbert Ford, were countable for any MA-LTC application for which their assets must be counted, including the applications of their Institutionalized Spouses. 7

Conclusion and Relief Requested 9

INDEX OF AUTHORITIES

Page

Cases

Family Tr of Massachusetts, Inc v United States,
722 F3d 355 (CA DC, 2013) 5

Harris v McRae,
448 US 297 (1980) 1

Hegadorn v Dep't of Human Servs Dir,
___ Mich App ____ (2017) 9

Lewis v Alexander,
685 F3d 325 (CA3 2012) 4, 5

Wisconsin Dep't of Health & Family Servs v Blumer,
534 US 473 (2002) 1

Statutes

42 USC 1396c 2

42 USC 1396p(b)(2)(B) 3

42 USC 1396p(d) 4, 5, 8

42 USC 1396p(d)(1) 5, 6

42 USC 1396p(d)(2) 1, 6

42 USC 1396p(d)(4)(A) 6

42 USC 1396p(h) 6

42 USC 1396r-5 ..... 2, 3

42 USC 1396r-5(a) 4, 7

42 USC 1396r-5(c)(1) 4

42 USC 1396r-5(c)(1)(A) 1

42 USC 1396r-5(c)(2)(B) 1

43 USC 1396r-5b 7

INTRODUCTION

Like the Claimants, their Amici misread the statutory language, conflating rules governing divestment with rules that govern what assets are countable in the first place. Divested assets are those given away without receiving full value in return, but any assets the couple still has access to are reviewed for countability against the limits for this means-tested program. Medicaid was never intended to maintain a desired lifestyle for a community spouse or preserve assets for heirs at public expense. Congress's plan provides for the Community Spouse's Minimum Monthly Maintenance Needs based on the expenses they present at application. The allowances are not generous, but public assistance is a limited fund and must be managed to assist as many as possible.

The rules to qualify an institutionalized (nursing home) individual with a community spouse require that all assets of both spouses, regardless of which spouse holds them or how they are held, are calculated to see if they exceed the limits Congress has established for eligibility for Medicaid benefits. 42 USC 1396r-5(c)(1)(A) & (2)(B). But Amicus's and Claimants' approach would bend the statutory text and evade assessing any assets that either spouse jointly or individually put into trusts for the community spouse. This is contrary to law. 42 USC 1396p(d)(2).

The Medicaid Act is complex (Amicus Br 10/27/17, p 1), but Congress's intent for its basic purpose has always been very plain. Medicaid is for the needy, *Harris v McRae*, 448 US 297, 301 (1980); and all resources of both spouses must be counted for the eligibility of the institutionalized spouse. *Wisconsin Dep't of Health & Family Servs v Blumer*, 534 US 473, 480 (2002); (Exhibit A).

ARGUMENT

I. The Michigan Court of Appeals correctly held that the assets in the Trusts held by these Community Spouses were countable assets for the Medicaid eligibility of their Institutionalized Spouses.

In its plan to protect community spouses from falling below the poverty line when qualifying an institutionalized spouse for Medicaid assistance, Congress uses the combined resources of both spouses to determine if they exceed the limits of the program. 42 USC 1396r-5.

A. The general rules for the calculation of trust assets for anyone whose assets must be counted for a Medicaid eligibility determination are found in 42 USC 1396p(d) and make the trust assets of these community spouses countable assets for eligibility of their institutionalized spouses.

Amicus incorrectly comingles several sections of law, creating a loophole that would eviscerate Congress's plan to allow the community spouse to keep sufficient but not excessive resources for his Minimum Monthly Maintenance Needs when the institutionalized spouse qualifies for benefits.

1. Medicaid

Medicaid is intended for the needy, and by law, as a condition of continuing to receive federal funding for its Medicaid program, 42 USC 1396c, Michigan examines every application for a long-term care benefits review of assets under two separate and distinct analyses. The Claimants have conflated and confused the two and attempt to interpret the statutory language for trust assets to undo Congress's plan in the Medicare Catastrophic Care Act, a plan intended to provide only for the

basic needs of a community spouse when the institutionalized spouse is eligible for public benefits.

a. Divestment Analysis

In the first scrutiny, the Department looks for any assets that have been given away or transferred away for less than full fair market value. This includes any transaction that puts assets where the applicant or spouse no longer has access to them. Such assets are "divestments," and a penalty period is assessed. The penalty period is based on the amount of the assets divested, and Medicaid benefits are not paid during the period that the divested assets could have paid for care.

There is an exception to this rule. A divestment is not assessed if the resource is given to the community spouse or transferred in a way that assures that he will be the only one who can make use of it. 42 USC 1396p(b)(2)(B). This is the "solely for the benefit of" rule, but it only works to avoid *divestment*, not the *countability* of an asset. This exception is perfectly logical because, since all assets of both spouses are counted for the eligibility of the applicant or institutionalized spouse, it doesn't matter if they trade them back and forth or who holds them or in what form. 42 USC 1396r-5. But these consolidated cases are not about divestment, and any mention of Solely for the Benefit of (SBO) provisions has no place in the discussion. SBO Trust provisions do not affect total assets for the countable asset evaluation which is at issue here.

b. Countable Asset Analysis

The second evaluation requires the Department to calculate the total of all assets of both spouses including any resources in which either or both have a beneficial interest. 42 USC 1396r-5(c)(1). Resources includes trusts. 42 USC 1396p(d). The purpose is to determine whether the couple's combined resources are in excess of the amount that Congress permits for the institutionalized spouse to qualify for public benefits. 42 USC 1396r-5(a); (Exhibit A).

Amicus joins Claimants in redefining a statutory term in a way that evades the assessment of any assets that these institutionalized spouses or community spouses, jointly or individually, put into trusts for the community spouses. We know that the assets in these trusts *are* available to the community spouses because: 1) if they had been transferred to make them unavailable to either spouse, it would have been a divestment, and 2) the express terms of each trust requires that all assets in each trust be paid out to the community spouse, who is the beneficiary, within his lifetime. (5/7/16 Hegadorn, Appellee Br, Exh 2; 5/7/16 Lollar, Appellee Br, Exh 2; 8/4/16 Ford, Appellee Br, Exh 2.)

c. Congress provided the rules to assess the trusts of anyone whose assets must be counted for Medicaid and has exempted only Special Needs trusts from general trust rules.

Trusts, by definition, have a bifurcated ownership, and before Congress took action in 1986, individuals attempted to use this characteristic to qualify for Medicaid even when they had substantial assets held in trusts. *Lewis v Alexander*, 685 F3d 325, 333 (CA3 2012). "Congress understandably viewed this as an abuse

and addressed the problem with statutory standards enacted in 1986." *Id.* The rules were again strengthened in the 1993 OBRA amendments, in which "Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility." But Congress also excepted from that rule three types of trusts meeting certain specific requirements. Taken together, these are generally called "special needs trusts" or "supplemental needs trusts." *Id.* These trusts are found at "paragraph 4" of 42 USC 1396p(d). The Claimants in the instant consolidated case do not have "(d)(4)" trusts and could not in any case meet the very specific qualifications for these trusts. Claimants have never asserted that they have or qualify for 1396p(d)(4) Special Needs Trusts. Instead, they fall under the rule that "trusts would be counted as assets for the purpose of determining Medicaid eligibility." *Id.*

42 USC 1396p(d)(1) provides for Paragraph 4 trusts for which Congress made the exception to the trust rules. *Family Tr of Massachusetts, Inc v United States*, 722 F3d 355, 357 (CA DC, 2013). A qualifying "special needs" or "supplemental needs" trust is "a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and [ ] intended to provide for expenses that assistance programs such as Medicaid do not cover." *Id.* To qualify, supplemental needs trusts under § 1396p(d)(4)(A) are required (1) to benefit a disabled individual who is under 65 years of age, (2) to contain this beneficiary's assets, (3) to have been established for the beneficiary by a parent, grandparent, guardian, or court, and (4) to give the state the amount left in the trust when the

beneficiary dies, up to the amount of total medical assistance paid by the state. 42 USC 1396p(d)(4)(A). If the trust meets these requirements, subsection (d) rules, including paragraph (3), do not apply as they do to all other trusts. 42 USC 1396p(d)(1) gives the rule for a special needs trust of the applicant. This section does not apply to the Hegadorns, Lollars, and Fords.

42 USC 1396p(d)(2), on the other hand, provides the general rules for all other individuals whose assets, including trust assets, must be evaluated for a Medicaid determination, whether he or she is the applicant, the spouse, a parent whose assets are counted for a minor's application, or any other situation where a trust and its assets must be evaluated. Amicus asserts that every time the term "an individual" or "the individual" when it refers back to "an individual" is used, it must refer to the applicant only. This cannot be. The statute itself defines the term "institutionalized individual," 42 USC 1396p(h), and uses that term throughout the text of the statute where it is intended. At other times "individual" is used in its general parlance.

The Court of Appeals correctly evaluated the statute as it applies in these cases and should be affirmed. Amicus has alleged that even millionaires should qualify for public assistance for Medicaid Long-term Care (Amicus Br for COA 10/12/16, pp 2-3), and in its brief before this Court is asserting that a community spouse should be able to put *any* amount into a trust to evade evaluation for the means testing of the couple's assets for Medicaid eligibility of the institutionalized spouse. This clearly contradicts the law and the purpose of Medicaid assistance.

In its brief, Amicus also asserts that after the institutionalized spouse is institutionalized, the income of the two spouses is kept separate. (Amicus Br 10-27-17, p 4.) But this case has nothing to do with income, and this section does not apply to assets. 43 USC 1396r-5b. Instead, the assets of the two spouses are combined to determine if the joint amount of the assets of both spouses, regardless of which spouse holds them or how they are held, is in excess of the amount that permits the institutionalized spouse to qualify under the means test. 42 USC 1396r-5(a). Additionally, Amicus's references to § 1396r-5(c)(4) are off point because that section actually applies *only* to the period *after* the spouses have already demonstrated that their joint assets are low enough for the institutionalized spouse to qualify.

II. Under all applicable law and policy, the Department correctly determined that the assets held in the trusts of community spouses, Ralph Hegadorn, Dallas Lollar, and Herbert Ford, were countable for any MA-LTC application for which their assets must be counted, including the applications of their Institutionalized Spouses.

The Department appropriately evaluated the assets held by the community spouses: Ralph Hegadorn, Dallas Lollar, and Herbert Ford, for the Medicaid eligibility of their institutionalized spouses: Mary Ann Hegadorn, Dorothy Lollar, and Roselyn Ford under the applicable law and policy. Neither the federal law nor the Department's own policy in the Bridges Eligibility Manual (BEM) had changed at any time relevant to these consolidated cases. And under that law and policy, the assets in the community spouse's trusts had to be evaluated for countable assets.

Each of the community spouse's trust required, by its express terms, that all assets in the trust had to be paid out to the beneficiary within his lifetime and in fact did not require that it be spread out over the lifetime. Each could have taken all assets in the first distribution. The applicable federal rule is found at 42 USC 1396p(d) Treatment of Trust Amounts, in Paragraph 3(B), which provides in pertinent part:

> (B) In the case of an irrevocable trust--
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual,

This section of law has been in effect since 1993, and because these community spouse trusts permitted (in fact required) distribution of all assets in the trust to the beneficiary, there were "circumstances under which payment could be made to the beneficiary." Therefore, these assets "shall be considered resources available" to the community spouse, whose assets had to be considered for the Medicaid application of his institutionalized spouse. Under all applicable law and policy, these three couples all had assets in excess of amounts permitted for eligibility because the assets in the community spouse trusts were available resources and countable for the application.

The Court of Appeals correctly pointed out that there had not been any change in policy or law related to applications for the claimants in these consolidated cases and referred to the Department's internal memorandum of August 20, 2014, which reminded the Department of the correct law and policy.

Hegadorn v Dep't of Human Servs Dir, ___ Mich App ____ (approved for publication June 27, 2017) (slip op at *9).

Although it is true that an error had surfaced in which trust evaluations were not being appropriately reviewed for the excess assets portion, once discovered, the Department Memo was issued, and policy implementation was corrected immediately. The Department was never free to deliberately continue an error it knew to conflict with federal law and its own policy.

CONCLUSION AND RELIEF REQUESTED

The Medicaid determinations that the Hegadorns, Lollars, and Fords received from the Department conform to federal law and regulations, as well as the Michigan Medicaid policy applicable to trust assets for institutionalized spouses and their community spouses when the institutionalized spouse is seeking Medicaid Assistance for Long-term Care. The Department correctly determined that although each of these couples had not incurred a divestment penalty by transferring assets to a trust for the sole benefit of the community spouse, the assets in the community spouse's SBO Trust were countable assets for purposes of each institutionalized spouse's Medicaid eligibility determination and that in each case, their assets were too high to qualify for benefits.

The Department requests that this Honorable Court dismiss the Claimants' request for leave to appeal to this Court, or in the alternative affirm the Court of Appeals decision in this case because it was correct.

Respectfully submitted,

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